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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

Copyright Royalty Board

OCT 02 2015

In the Matter of

DETERMINATION OF RATES AND TERMS
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR

INITIAL MEMORANDUM OF LAW OF THE
AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM),
THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND
CANADA (AFM), AND SCREEN ACTORS GUILD –
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA)

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The American Association of Independent Music (A2IM), the American Federation of Musicians of the United States and Canada (“AFM”) and the Screen Actors Guild – American Federation of Television and Radio Artists (“SAG-AFTRA”) (collectively, “Interested Independent Record Label and Artists’ Union Parties”), as individual constituents of SoundExchange, jointly file this brief in response to the referral dated September 11, 2015 by the Copyright Office Judges’ (“CRJs”) to the Copyright Register of a “novel material question of law” concerning whether the CRJs can set more than one rate for different categories of licensors in the pending Webcasting IV proceeding to set rates for compulsory licenses pursuant to 17 U.S. Code Section 114(f)(2)(B) for so-called non-interactive services for the term 2016-2020 (the “Referral Order”). The answer is: No.

The Interests of the Parties

A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 350 independently owned U.S. music labels. A2IM's members are small and medium-sized music enterprises (SMEs). A2IM's membership includes music labels of varying sizes within the SME definition and varying staffing levels across the United States, from Hawaii to Indiana to Florida, representing musical genres as diverse as its membership. Independent doesn't mean just small artists. For example, A2IM member labels have issued music releases by artists including Taylor Swift, Mumford & Sons, the Lumineers, Vampire Weekend, Adele, Paul McCartney and many others during the past several years. Some of these artists' tracks are distributed by the major recording companies (Universal, Warner and Sony), but it is independent labels who are the owners of the sound recordings and who retain the exclusive right, as label, to license the recordings and collect revenues stemming from non-interactive digital performances in the United States.

SAG-AFTRA is a national labor union representing more than 165,000 recording artists and vocalists, as well as actors, announcers, broadcasters, and other media professionals. SAG-AFTRA exists to secure the strongest protection for media artists in sound recordings, motion pictures, television, and most other forms of media, including all forms of digital media.

AFM is the largest union in the world representing professional musicians, with over 70,000 members in the United States and Canada. Musicians represented by the AFM record music for sound recordings, movie sound tracks, commercials and television and radio programming, as both featured and session musicians. AFM works to protect the economic interests of musicians and to give them a voice in cultural and policy debates that affect them at home and abroad.

Together, SAG-AFTRA and AFM (“Artists’ Unions”) represent the sound recording performers – including featured artists, session vocalists and session musicians (“Artists”) – whose creative work brings American music to life. Without their recorded performances, there would be no sound recording industry, no digital musical services and no radio industry as we know it. The talent, drive and output of American Artists are at the heart of creative works of the greatest cultural and economic value to our country. In recognition of that fact, and as a result of the advocacy of the Artists’ Unions, Section 114 provides that the Artists shall receive 50% of the compulsory statutory license proceeds, with 45% of those proceeds paid to featured artists directly by SoundExchange, and 5% paid to non-featured musicians and vocalists through the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, the independent administrator for the non-featured artist share.

The Importance Of A Level Playing Field In The Section 114(f)(2)(B) License To The Interested Independent Record Label and Artists’ Union Parties

The Section 114(f)(2)(B) compulsory statutory license, is the appropriate mechanism to ensure fair treatment of creators/investors and their Artists, with rate setting by the CRJs after a fair hearing of all economic factors. As previously determined by the Copyright Register in 1998 (as discussed more fully in Part I.C below), the statutory license should compensate each copyright holder (and the associated Artist share) equally for each performance of a recording.

The identity of the creator of the sound performance or the economic power of the investor in the sound recording should be irrelevant to rate setting. The only differentiation in pay should be based upon consumer demand for the music, *i.e.*, according to the number of streams that occur for each recording, and not according to who owns or controls the applicable rights. That is the basis of the compulsory statutory license; each individual jazz recording, blues recording, pop recording or classical recording should all have the same basic single usage value.

Independent record labels and Artists, who are individuals and small and medium sized businesses, want a statutory license that places all sound recording owners and their Artists on a level playing field. However, statutory price-differentiation based on category of licensors could arbitrarily tip the scales in favor of some participants over others, and it would create a number of unintended and expensive issues for all market participants, especially when there is no market remedy available to any licensor who is arbitrarily not granted a hypothetical "top rate" by the CRJs. This would be a significant additional distortion to the marketplace, dramatically amplifying the effect of the artificial statutory license on the market itself. It would also multiply the number of parties in rate proceedings and create incentives for the interested parties to increase their spending within those proceedings, creating the very inefficiency that the statute intended to ameliorate. Moreover, it would also arbitrarily favor those participants who are able to spend the most to make their case before the CRJs. Furthermore, if any rights holders believe they can achieve a different rate if left to their own devices in a market without a statutory rate, as discussed below, that is accommodated already by the statutory scheme via Section 114(f)(3).

Thus, the legislature could not have intended that government (as opposed to the market itself) would decide who the "winners" and "losers" are based on just a selection of cherry-picked market evidence submitted to the CRJs. If differentiating rates based on licensor was actually intended, and putting aside for the moment the fact that the statutory licensing system brings with it significant efficiencies that benefit all licensors and services, then one could argue that there would be no need for a statutory license at all. If two rates are better than one, then surely three are better than two, four are better than three, and so on. Why stop at anything less than the actual free market itself?

Nevertheless, Congress has elected to regulate licenses and maintain a compulsory

license scheme that, despite compelling copyright owners to license their works without their consent, provides a trade-off in the form of efficiencies for all parties, including lower transactional and administrative costs. Furthermore, the recent United States Copyright Office's report "Copyright and the Music Marketplace" (hereafter, "Copyright Office Music Industry Report") describes the current system of Section 112 and 114 licenses as "one of the few things that seems to be working reasonably well in our licensing system" and further states that the "licensing framework itself is generally well regarded." *See* Copyright Office Music Industry Report, <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>, at 6-7 and 114. If the sound recording industry is to be regulated in this way, the playing field for all owners must, at least, be level.

ARGUMENT

The CRJs cannot permissibly set a rate under 114(f)(2)(B) that differentiates among copyright owners for a variety of structural legal, practical and historical reasons, as set forth below. Moreover, setting differential rates in the current proceeding, which is now closed, would violate due process and the strictures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 501 *et seq.*

I. Section 114(f)(2)(B) Does Not Permit Setting Different Rates For Different Copyright Owners

A. The Structure of Section 114(f)(2)(B), (C) and (3) Dictate The Legal Conclusion That Congress Did Not Intend The CRJs To Set Differential Rates Based On The Identity Of The Licensor

As a threshold matter, the relevant statute needs to be considered. The first part of Section 114(f)(2)(B) provides, in pertinent part, that:

The schedule of reasonable rates and terms determined by the
Copyright Royalty Judges *shall*, subject to paragraph (3), *be*

binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), a transitional period provided under section 6(b)(3) of the Copyright Royalty and Distribution¹ Act of 2004, or such other period as the parties may agree. Such rates and terms *shall distinguish among the different types of eligible nonsubscription transmission services* then in operation and shall include a minimum fee for each such type of service, *such differences to be based on criteria including*, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers.

17 U.S.C. §114(f)(2)(B) (emphasis added).

This first part of the relevant statutory provision makes clear that the CRJs may set different rates based on the type of service being licensed, but makes no distinction as between copyright holders. As such, Congress clearly was focused on differences in music use by different types of services, not on differences in the identity of copyright owners when it passed, and later amended, Section 114(f)(2).

Additionally, that Congress dictated that the rates “shall. . . be binding on *all* copyright owners,” indicates that “all” can only mean “all” equally, unless some further refinement is required based on the remainder of the statute. But the statute only provides for such further refinement with respect to licensees -- not with respect to licensors.

The next part of Section 114(f)(2)(B) also structurally supports just a single rate for all copyright owners:

In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive and programming information presented by the parties, including--

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) ***the relative roles of the copyright owner and the transmitting entity*** in the copyrighted work and the service made available to the public with respect to ***relative*** creative contribution, technological contribution, capital investment, cost, and risk.

17 U.S.C. § 114(f)(2)(B) (emphasis added).

It is evident from this text that the phraseology of the term “relative roles” and “relative” in (ii) refers only to relative roles comparing owners and users, not relative investments and risks among owners.

Following this, Section 114(f)(2) adds sub-section (C), which again makes clear that the only appropriate distinctions to be made are among users, not owners:

(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service ***indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational***, for the purpose of determining reasonable terms and rates of royalty payments ***with respect to such new type of service*** for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.

17 U.S.C. § 114(f)(2)(C) (emphasis added).

Finally, Section 114(f)(3) makes clear that to the extent individual copyright owners have the ability to directly license, they may do so and thus not be bound by the statutory rate:

License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more

entities performing sound recordings shall be given effect in lieu of any decision of the Librarian of Congress or determination by the Copyright Royalty Judges.

17 U.S.C. § 114(f)(3).

Accordingly, Section 114(f)(3) provides for a structural “off ramp” for those copyright owners who do not wish to adhere to the statutory rate and have the ability to insist on different rates or terms. While the statutory rate will, in practice, often operate as a ceiling, other economic terms can be added and services altered such that owners can offer additional value to services that result in rates that differ from the statutory rate.

Well-worn maxims of statutory construction, including the maxims of *noscitur a sociis*, *ejusdem generis*, and *casus omissus*, support only a reading that the CRJs may not differentiate between copyright owners in setting statutory compulsory license rates under Section 114(f)(2)(B).

First, the doctrine of *noscitur a sociis*, provides that words must be construed in conjunction with the other words and phrases used in the text of a statute. Translated as “words must be construed by the company that they keep,” it is evident that where Congress intended the CRJs to make distinctions between things in Section 114(f)(2)(B) proceedings, it was only with respect to differences in the services that use music, and there was no intent to make distinctions among owners.

Next, the maxim of *ejusdem generis* also dictates the same conclusion. Where a statute describes things of a particular class or kind accompanied by words of a generic character, the generic words will usually be limited to things of a kindred nature with those particularly enumerated, unless there is something in the context of the statute to the contrary. Here, again, the list of considerations for the CRJs to consider all point to making distinctions between users,

but no language points to distinctions among owners. Under this doctrine, then, the CRJs should not reach to make distinctions among owners.¹

Finally, the canon of *casus omissus pro omisso habendus est*. also applies here. This maxim provides that a person, object, or thing omitted from an enumeration in a statute must be held to have been omitted intentionally. Here, the omission of any stated basis to distinguish rates among owners evidences Congress' intent that the CRJs not do so.

**B. Practical Issues Also Compel The Conclusion That Congress
Did Not Intend To Permit Differential Rates Based On
Ownership**

There are also a number of practical issues that dictate a single statutory rate. For example, a service that performs a recording is constant, whereas the entity or person who owns or controls rights of any particular recording can be quite fluid and historically quite hard to keep track of, as ownership and distribution rights change over time.² And, licensees cannot necessarily distinguish between ownership and distribution rights, so, as discussed above, where some labels or persons or entities, including the major-owned distribution companies, distribute copyrighted sound recordings owned or controlled by other labels or persons, the licensee (or the collection agency) usually does not have information readily available and sufficient to make

¹ In addition, the doctrine of *expression unius est exclusio alterius* may apply here. This maxim stands for the proposition that the express mention of one person, thing, or consequence implies the exclusion of all others. Where a statute is expressly limited to certain matters, it may not, by interpretation or construction, be extended to other matters. This rule proceeds from the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned.

² There is simply no effective way that the Interested Independent Record Label and Artists' Union Parties are aware of for licensees or the collection agent to identify recordings by the "nature of the licensor." Users rarely even report ISRC numbers; and they need SoundExchange's assistance in administering the handful of direct licenses that have been done. The Section 114 system assumes that licensees don't need to worry about determining who owns what, and by and large they have no way to do so.

that distinction.

When the statute was authored, it thus made sense that there was an intention only to differentiate based on the type of service offered by the licensee and not based on some vague characterization of the licensor, which after all, might vary during the term of the five year license. Accordingly, setting differential rates within a licensing system that lacks the tools necessary to distinguish promptly which label, entity or person controls which rights, would add additional levels of complexity to the overall licensing system. This would create significantly higher administrative costs for all parties, contrary to the intention of Congress.

Moreover, differentiation by licensor will only further distort the market. As a regulatory matter, the statutory license compels property rights owners involuntarily to forego the injunction they would otherwise be entitled to if the user did not agree to market place rates and terms. The statutory license thus already introduces a significant distortion in the market. If the CRJs set different rates for different licensors, that will only create a new dynamic, in which certain labels and their artists are advantaged over others.

By way of one example how such a result could occur, there likely would be an unintended effect of creating an incentive for the services to favor content that is cheaper to them, not necessarily rewarding those who are granted a higher rate. So if there was a higher rate for some owners, those owners might not even want a higher statutory rate because the servicer might then play more streams of a repertoire of a competitor that was granted a lower rate. This could potentially reduce the revenue that a label could earn from its copyrights, even with a higher statutory rate. There is also the risk that differential rates might create a secondary market, which would incentivize some rights holders stuck with lower rates to enter into distribution agreements with other rights holders who were granted a higher rate by the CRJs. It clearly could

not have been the intent of Congress, when establishing the statutory license, to allow for the licensing system to arbitrarily grant some companies a self-perpetuating advantage over other companies and invite gaming the system in this way.

C. Historical Rate Setting Precedent Compels The Conclusion That Congress Did Not Intend To Permit Differential Rates By Categories Of Licensors

Finally, there is a set of settled expectations in rate proceedings that rates not be distinguished based on the identity of the licensor. First, in each of the four Webcasting proceedings, including the present Webcasting IV proceeding, there have been multiple users who submitted proposals but, with limited exceptions not relevant here, just one principal representative of the copyright owners. In all cases, no party proposed rates differentiated by category of sound recording owner.³

Indeed, the Interested Independent Record Label and Artists' Union Parties also are not aware of *any* rate proceeding presided over by the CRJs or its predecessors appointed pursuant to Chapter 8 of the Copyright Act (*see* 17 U.S.C. § 801(b)(1)-(2)), under any of Sections 111, 112, 114, 115, 116, 118, 119, or 1004 where a distinction was made as between owners of the same copyright right.

This settled expectation has not been challenged in the current proceeding. No party has

³ *See* Docket No. 2000-9 CARP DTRA 1&2, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings ("**Webcasting I**"), 67 Fed. Reg. 45240, at 45240-42 (describing parties and rate proposed) (July 8, 2002); Docket No. 2005-1 CRB DTRA, Digital Performance Right in Sound Recordings and Ephemeral Recordings ("**Webcasting II**"), 72 Fed. Reg. 24084, at 24084 and 24088-90 (describing parties and rate proposed) (May 1, 2007); Docket No. 2009-1 CRB Webcasting III, Digital Performance Right in Sound Recordings and Ephemeral Recordings ("**Webcasting III**"), 76 Fed. Reg. 13026, at 13026-27 (describing parties and rate proposed) (March 9, 2011); *id.*, 79 Fed. Reg. 23102, at 23106 ("**Webcasting III, Determination After Remand**") (Apr. 25, 2014) (CRJs expressly stating, in referencing an expert's testimony, that the expert "properly" identified the "willing sellers" as the "the several record companies."); Docket No. 14-CRB-0001-WR, Digital Performance Right in Sound Recordings and Ephemeral Recordings, Notice of Participants and Case Scheduling Order ("**Webcasting IV**") (Feb. 9, 2014).

ever suggested that different owners should receive different rates. In fact, the opposite is true. Rather, the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at the blended rates reflected in their proposals.

Indeed, in the first proceeding under the Digital Performance Right in Sound Recordings Act of 1995, under the predecessor to the current version of Section 114(f) for then extant digital services, the Copyright Register made a specific finding on this point:⁴

2. Value of an individual performance of a sound recording.

The Register notes that the Panel stopped prematurely in its consideration of the value of the public performance of a sound recording. Its entire inquiry focused on the value of the “blanket license” for the right to perform the sound recording, without once considering *the value of the individual performance*—a value which must be established in order for the collecting entity to perform its function not only to collect, but also to distribute royalties. Consequently, *the Register has made a determination that each performance of each sound recording is of equal value* and has included a term that incorporates this determination.

To do otherwise requires the parties to establish criteria for establishing differential values for individual sound recordings or various categories of sound recordings. *Neither the Services nor RIAA proposed any methodology for assigning different values to different sound recordings.* In the absence of an alternative method for assessing the value of the performance of the sound recording, the Register has no alternative but to find that the value of each performance of a sound recording has equal value. Furthermore, the structure of the statute contemplates direct payment of royalty fees to individual copyright owners when negotiated license agreements exist between one or more copyright owner and one or more digital audio service. To accommodate this structure in the absence of any statutory language or legislative intent to the contrary, *each performance of each sound recording*

⁴ The rates at issue in this proceeding involved three services, and consistent with all of the Webcasting proceedings, there was a single representative of all sound recording owners, in this case, the RIAA.

*must be afforded equal value.*⁵

Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25412 (May 8, 1998) (overturning certain aspects of rates and terms set by the CARP, the predecessor to the CRJs) (emphasis added); *see also id.*, at 25414, Section 260.2(d): “During any given payment period, the value of each performance of each digital sound recording shall be the same.”). The recent Copyright Office Music Industry Report also repeats this point. *See* Copyright Office Music Industry Report, at 114 (citing A2IM’s May 23, 2014 comments, at 3); *see also id.* at 144 (“In the Office’s view, there is no policy justification to demand that music creators subsidize those who seek to profit from their works.”).

Although Section 114(f)(2) has been amended since 1998, the structural considerations considered in 1998 have not been altered. There is no reason, based on the current record, to alter this conclusion now. Indeed, as discussed in the next section, to do so would be unfair and would violate due process, and even more so because the Webcasting IV proceeding is now closed.

II. Even Assuming, *Arguendo*, Different Rates Were Permitted, The Copyright Office Cannot Apply Them To This Webcasting IV Proceeding, Which Is Closed

It bears repeating that no party to the Webcasting IV proceeding has advocated for or even suggested it would be appropriate for the CRJs to distinguish rates based on the identity of

⁵ For completeness, the Register added:

This determination does not alter the statutory provision that specifies how the copyright owner of the right to publicly perform the sound recording must allocate the statutory fees among the recording artists. *See* 17 U.S.C. 114(f)(2).

It is clear from context that the Register meant to refer to the then extant version of 114(g) rather than 114(f)(2).

the owners. Accordingly, the independent labels and Artists were satisfied that SoundExchange, acting through a single law firm, could represent all copyright owners and interested Artists equally in the proceeding, and there were no conflicts among the constituents of SoundExchange.

The selection by the parties interested in the proceeds of the Section 114 license of a single representative makes sense because they relied upon the prior history, discussed above, whereby there has never been a rate proceeding that made a distinction among the sound recording owners or owners of the same right and the Register declared that the value of each performance of each digital sound recording shall be the same. It is too late to change that standard now since the Webcasting IV proceeding is closed.

A. The Due Process Standard Under The Constitution and The APA

Due process under the United States Constitution and the Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing “shall be timely informed of ... (the) law asserted.” 5 U.S.C. § 554(b)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the interested party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard.

In addition, adoption of a new rule here would significantly alter the burden of proof in the Webcasting IV proceeding (by requiring evidence from additional parties and access to a heavily redacted record that A2IM members and Artists do not currently have), which would be a violation of 5 U.S.C. § 556.

Numerous due process decisions in other agency adjudication processes bear this out. For example, in other intellectual property agency adjudicatory proceedings such as those in the patent office, the APA’s requirement that the substantive rules not be changed midstream have

been held to apply.

Most recently, in *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, Civ. No. 2014-1466, 2015 U.S. App. LEXIS 14826, *7 (Fed. Cir. Aug. 24, 2015), the Federal Circuit held that 5 U.S.C. § 554(b)(3) requires that “[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted”; that § 554(c) requires that agencies give “all interested parties opportunity for . . . the submission and consideration of facts [and] arguments . . . [and] hearing and decision on notice”; and § 556(d) “entitle[s]” an interested party “to submit rebuttal evidence.” Indeed, the *Progressive* court made very clear that § 554(b)(3) means that “*an agency may not change theories in midstream* without giving respondents reasonable notice of the change” and “the opportunity to present argument under the new theory.” *Id.*, at *7 (emphasis added) (citing *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968)). See also *In re Biedermann*, 733 F.3d 329, 337 (Fed. Cir. 2013) (where PTAB, an adjudicatory body adopted different reasons to support a new ground of rejection of certain patent claims, the APA required the PTO “to provide prior notice to the applicant of all ‘matters of fact and law asserted’ prior to an appeal hearing before the Board,”; finding that failure to follow these procedures required the Court to vacate the Patent Trial and Appeal Board’s adjudicatory decision); see also *Rambus Inc. v. Rea*, 731 F.3d 1248 (Fed. Cir. 2013).

The same holds true in other adjudicatory proceedings. For example, in *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals held that due process was violated where the petitioners’ application for authorization to hold interlocking directorships in certain corporations was rejected. The court held that this rejection was procedurally defective because it stemmed from FERC’s adoption, after the close of the evidentiary hearing, a new legal standard of proof which he was given no opportunity to meet.

It is not just the APA that requires this rigorous “no midstream change” rule. Supreme Court cases have long held that a new standard cannot be applied retroactively as a constitutional imperative of due process. *See, e.g., West Ohio Gas Co. v. Public Utilities Comm’n*, 294 U.S. 63, 70-71 (1935); *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 n.10 (1974) (cases collected). Here, there was no notice of a new standard to apply different rates to different categories of copyright owners in the now closed Webcasting IV proceeding.

B. Even Where Midstream Changes Can Be Applied Retroactively, The Standard Is Difficult To Meet And Has Not Been Met Here

A2IM’s members and the Artists’ Unions had no knowledge that they should consider entering the proceeding with their own separate representation and rate proposals to present appropriate evidence and arguments on the novel hypothetical standard posed by the CRJs. An opportunity to submit evidence on this issue would have been imperative because it affects the rights of A2IM’s and the Artists’ Unions’ members to protect the value of their property rights and royalties in a situation where the government imposes a compulsory license.

The D.C. Circuit has been adamant, for over 40 years, that even where a midstream change is permissible, a rigorous standard must be met before that standard can be applied retroactively. That standard has not been met here. In the seminal case, *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) (“*First Union*”), the D.C. Circuit held that an agency cannot give retroactive effect to a new legal standard adopted in the course of agency adjudication without taking into account the following five factors:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,

(3) the extent to which the party against whom the new rule is applied relied on the former rule,

(4) the degree of the burden which a retroactive order imposes on a party, and

(5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. See also *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1553-1554 (D.C. Cir. 1993) (in determining whether a rule announced in an agency adjudication may be given retroactive effect, we have typically considered the five factors set forth initially in [*Retail Union*]).

Taking all of these considerations into account, the D.C. Circuit in *Retail Union* found that the inequity of applying the new rule at issue in that case to the facts far outweighed the interests that might be furthered if it were applied. The same reasoning and result pertains here.

Applying the *Retail Union* factors, it is clear that even if the Register believes that Section 114(f)(2)(B) does not preclude separate rates based on the identity of the copyright owner, it cannot apply such differences in the closed Webcasting IV proceeding.

(1) The case is one of first impression.

Applying the first *Retail Union* factor, the CRJs have already indicated that this is a novel issue of law and thus one of first impression. In such circumstances, it is not appropriate to apply a rule retroactively. See also *Consolidated Edison v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (an agency must adhere to its precedents in adjudicating cases before it; can only change the established law and apply newly created rules in the course of an adjudication where the rule is not arbitrary and capricious). New standards of law can only be applied retroactively to the parties in an ongoing adjudication, if (a) the parties before the agency are given notice and an opportunity to offer evidence bearing on the new standard **and** (b) the affected parties have not detrimentally relied on the established legal regime. *Id.* (citing numerous cases including *Retail Union*).

In *Consolidated Edison*, the D.C. Circuit also distinguished between policy statements and changes in substantive law; policy statements can be relied upon during a pending case because they do not carry the force of law, whereas like here, unannounced changes in the substantive standard of adjudication cannot be changed midstream. Here, the rates determined are “binding on all copyright owners,” 17 U.S.C. §114(f)(2)(B), and thus the proposed change is substantive in nature. Application here would be the very definition of an impermissible “arbitrary and capricious” change, since, as discussed above, there is no basis in the record to make distinctions among many different types of owners and owner-distributor relationships. Plus, the independent labels, representing over a third of the market, did not have sufficiently independent representation of counsel at the pending proceeding to review the redacted agreements in the record in order to even know what differential rates might be proffered.

(2) The novel proposed standard represents an abrupt departure from well-established practice.

Second, as described above, setting differential rates based on categorizing owners would be an abrupt departure from past rate setting decisions and the Register’s 1998 finding. There is no basis in the record as far as A2IM and the Artists’ Unions can tell, to simply make two or more categories of owners, and from the order of reference, it is not even clear if that is what the CRJs are suggesting. Would the lines be drawn by market share? By designation as an independent or major? Independent labels and individual sound recording owners come from many stripes. Would they differentiate between majors? Should there be geographic distinctions? Distinctions based on whether the independently owned records are distributed by the owner, or by a major, or through other means? Can there be distinctions made based on genre of work (*i.e.*, does a popular top 40 song deserve a higher rate than a jazz recording with a specialty audience)? And so on. The CRJs may not make such arbitrary determinations. *See* 5

U.S.C. § 706(2)(A) (requiring courts to set aside an agency decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).⁶

(3) The interested parties relied on the former standard.

Third, independent labels clearly relied upon the existing rule because they did not put in evidence on such distinctions. The only statutory criteria that arguably could even be applied would be the criteria in 114(f)(2)(B)(ii): “creative contribution, technological contribution, capital investment, cost, and risk.” As explained above, these distinctions are not meant to apply vis a vis different types of owners but rather as a comparator between users and all owners.

Nevertheless, had there been notice of the potential for distinctions to be made among owners, independent labels may have demonstrated that they provide a greater degree of creative contribution to recordings they own than the major recording companies, make better technical contributions, make greater capital investments on a track-by-track basis (in absolute or relative terms), and collectively take greater risks at higher costs than majors who have economies of scale.

Moreover, while, at first blush, it might seem that there are blunt lines that can be roughly described in conversation, in practice such differentiation — whether it is between “newer” or “older” recordings, between “major” and “independent” recordings, between different genres of music, or any other distinction that might be drawn — rapidly falls apart, especially when the role of digital distribution is taken into account.

Consider the following type of common occurrence: an artist on a particular “Label A” receives her rights back and decides to self-release her recordings on her own “Label B.” In this instance it would not be reasonable, equitable or an accurate reflection of the market if Label B’s

⁶ This provision of the APA applies to copyright office administrative adjudications. *See* Determination of Reasonable Rates and Terms For The Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, at 25398 (May 8, 1998).

recordings are earning a lower rate the day after it goes from Label A to being self-released.

Accordingly, there is no basis to apply a different statutory rate to different labels, and independent labels and artists relied on the past practice in this regard when they decided not to proffer separate evidence on differential rates.

(4) Retroactive application would impose a huge burden on the parties.

Fourth, a new proposed standard to differentiate rates by categories of ownership would impose significant burdens on independent labels, many of which are extremely small businesses, and the Artists' Unions, to engage their own counsel. That will always be true, but is particularly true with respect to retroactive application of a novel standard to the pending proceeding because there was no expectation, in establishing legal budgets, that such representation would be necessary.

At a minimum, the heavy redactions of the record are hugely problematic since the members of A2IM and the Artists' Unions do not know the terms of the "marketplace" deals under consideration. As one example, comparing the Warner-IHEART deal to the Merlin-Pandora deal, different constituents of SoundExchange (artists, independent labels and the major recording companies, and even entities and individuals within those broader categories) might have differing views of the reasons for such differences and the value of things like steering and other consideration of value aside from the rates.

Also, due to the redactions in the public record, the members of A2IM and the Artists' Unions do not know the terms of the deals Apple did with the majors (*see* Testimony of Darius Van Arman, Oct. 6, 2014, in Webcasting IV, at 12-13), and if those were used as some basis to differentiate rates, the members of A2IM and the Artists' Unions cannot even have an opportunity to explain why any differential rates in the marketplace should or should not be taken into account.

Setting differential rates would also impose a burden on SoundExchange in administering payments under Section 114(g). If a particular track is owned by an independent or individual, but distributed by another entity, the paying agent would have to make additional distinctions based on whether a track falls under one rate or the other. At the moment, there is no administrative process, or dispute resolution process which can rapidly clarify for a licensee what label, entity or person controls the digital performance right for a recording, and it is doubtful one could be developed by January 1, 2016 when the new rates are scheduled to go into effect.

(5) There is no statutory interest in applying a novel proposed standard.

Finally, with respect to the fifth *Retail Union* factor, there is no statutory interest in applying a new standard here over the reliance of the parties on the old standard. As noted, no party to the proceeding advocated for such a differentiating rule, and the economists for both the services and the owners, to the extent their work is not redacted, all appear to have taken into account differing marketplace rates in arriving at blended unitary rates in their proposals.

Moreover, whether inside or outside of the Webcasting IV proceeding, to the awareness of A2IM and the Artists' Unions, no user of music and no Congressional, Judicial or Executive branch entity has expressed an interest in applying differential rates. And, as discussed above, doing so could create an unfortunate dynamic in this and future rate settings, by potentially pitting labels against each other or creating user and/or ownership-licensor gamesmanship.

The current record simply doesn't provide the CRJs with an effective way to draw lines between licensors. The interested parties have no idea what sort of rules the CRJs would apply in determining who would get which rate; in practice any differentiation that might be drawn rapidly falls apart, especially when the role of digital distribution is taken into account. Moreover, because it is impossible to predict how the CRJs would actually draw lines, the interested parties cannot even know what information to provide that might assist in ensuring

that application is not erratic and unpredictable, and unintended consequences do not result. The Section 114 license — and SoundExchange as an organization — is founded on the idea that everyone on the creator side — majors, indies, artists, unions — are pulling in the same direction.

There is no statutory reason to alter this efficient resource, and there would thus be significant prejudice to more than one-third of the affected copyright owners to change course at this point in the proceedings.

III. In The Unlikely Event The Register Approves The Use Of A New Standard For The Present Proceeding, Then At A Minimum Due Process Requires That The Evidentiary Record Be Reopened

The cases discussed above mandate that the Webcasting IV proceeding not be reopened now, and that even if the Register finds that more than one rate differentiated by owner hypothetically could be set, that the CRJs could only do so prospectively in the forthcoming Webcasting V proceeding for rates commencing in 2021.

However, in the unlikely event that the Register believes differential rates could be applied retroactively to the Webcasting IV proceeding, at a minimum, the Constitutional and APA case law discussed above (not restated here) all stand for the proposition that the record must be reopened for the members of A2IM and the Artists' Unions to be provided with additional due process.

This should include, at a minimum: (a) notice precisely of the evidence that the CRJs believe justify a differential rate and what categories of owners such rate or rates would apply to and what criteria the CRJs would consider in determining such differential rates; (b) an opportunity not only to supplement with additional argument based on the existing record that such differentials are or are not justified, but to supplement the record with additional evidence

and renewed cross-examination of any pertinent witnesses; and (iii) consider having their own independent counsel free of potential conflict present their position if it is determined that there are differences in views by the categories of owners that the CRJs identify.

Among other things, as noted above, the members of A2IM and the Artists' Unions would need sufficient time to consider what evidence to present concerning differing creative and technical contributions among owners and artists, as well as the different relative capital investment, cost and risk as between different categories of owners and artists, if those are the criteria to be used. This record cannot be built quickly.

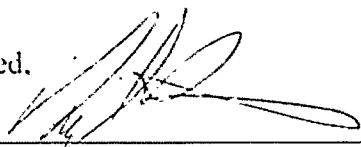
While the better position is that the proceeding should not be reopened, due process and fundamental fairness dictates that if a novel standard is declared permissible and applied retroactively, sufficient process be afforded for the interested parties to address the change.

CONCLUSION

For the foregoing reasons, the CRJs may not set rates under 17 U.S.C. § 114(f)(2)(B) that differ based on the identity of the owners of sound recordings. In the event that the Register disagrees, such differential rates may not be ordered in the current Webcasting IV proceeding retroactively without violating due process under the U.S. Constitution and the APA. Finally, in the unlikely situation where a novel standard is applied retroactively, due process requires that the Webcasting IV proceeding be re-opened, upon notice of the categories the CRJs are considering, for the interested parties to submit both new evidence and new argument.

DATED: October 2, 2015

Respectfully submitted,



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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of

**DETERMINATION OF RATES AND TERMS
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)**

Docket No. 14-CRB-0001-WR

CERTIFICATE OF SERVICE

I, David Leichtman, hereby certify that a copy of the foregoing **INITIAL MEMORANDUM OF LAW OF THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), AND SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (SAG-AFTRA** has been served electronically by agreement of the parties on this 2nd day of October, 2015, with hard copy sent by first class mail upon the following parties:

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